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In the Supreme Court of the United States

OCTOBER TERM, 1993

KAMEHAMEHA SCHOOLS/BISHOP ESTATE, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the schools operated by petitioner do not have a primarily religious purpose and character, and therefore are not entitled to engage in religious discrimination under the exemption for religious educational institutions provided by Section 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 990 F.2d 458. The opinion of the district court (Pet. App. 20a-43a) is reported at 780 F. Supp. 1317.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1993. A petition for rehearing was denied (and the opinion amended) on May 10, 1993. Pet. App. 55a-56a. The petition for a writ of certiorari was filed on August 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a trust created in 1884 by the will of Bernice Pauahi Bishop, a member of the former Hawaiian royal family, to establish and operate the Kamehameha Schools in order "to provide * * * a good education in the common English branches, and also instruction in morals and such useful knowledge as may tend to make good and industrious men and women." Pet. App. 2a & n.1. The will directed that "the teachers of said schools shall forever be persons of the Protestant religion," but did not restrict selection to "any particular sect of Protestants." *Id.* at 2a n.1.

Petitioner opened a school for boys in 1887 and one for girls in 1892. C.A. App. 37. In 1965, the schools were consolidated into a single co-educational institution with elementary and secondary schools.[1] *Id.* at 37-38. Since their founding, the schools have been continuously supported, controlled and managed by petitioner through its board of trustees. *Id.* at 38. No Protestant or other religious denomination owns, supports, controls or manages either petitioner or the schools. *Id.* at 42.

In the 1989-1990 academic year there were 3,041 full-time students enrolled in the schools (C.A. App. 45), only 32% of whom were Protestants (*id.* at 47-48). The schools run a number of part-time or supplemental educational programs (including summer programs, elementary enrichment programs for Hawaiian students in public schools, adult education

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[1] The abandonment of separate facilities for boys and girls violated the facial terms of the will and required approval, which petitioner sought and received, from the state courts. See Pet. App. 18a n.18; C.A. App. 37-38.

classes, and post-secondary scholarships and counseling for Hawaiian students who did not attend the schools), which in 1989-1990 reached almost 17,000 students, as well as several other general educational activities (including a Hawaiian Lecture Series, a Hawaiian Studies Institute, the Native Hawaiian Drug Free Schools and Community Program, college counseling services provided in public schools, and a Native Hawaiian Higher Education Demonstration Program), which in 1989-1990 reached another 22,000 participants. *Id.* at 50-51. The record does not reflect what percentage of the administrators, faculty, staff or participants in these programs are Protestant. Several of the schools' collateral programs (including the Prevention of School Failure program and hearing screening, college counseling, and post-secondary counseling and financial aid programs for native Hawaiian students in public schools) receive federal funding. *Id.* at 53. The schools do not apply the will's Protestant-only requirement to positions in such programs. *Ibid*; see also *id.* at 49; Pet. App. 17a n.17.

Petitioner's full-time students are exposed to an ordinary secular curriculum, but are required to take one course in religion each year, involving about one 30-minute class period per week. Pet. App. 10a-12a. Boarding students are also required to attend religious services on Sundays. *Id.* at 10a. In addition, teachers of kindergarten through eighth grade classes lead their students in a daily prayer before lunch, and boarding students say grace before school dinners. *Ibid.*; C.A. App. 46. The schools do not endeavor to convert the non-Protestant students who constitute the large majority of the student body. Pet. App. 10a; C.A. App. 48.

The schools' faculty includes a chaplain, who is an ordained Protestant minister. C.A. App. 39; see Pet. App. 9a. Since 1907, the chaplain has been the minister of the Bishop Memorial Church, a church on the school campus which is a member of the Hawaii Conference of the United Church of Christ. C.A. App. 42; see Pet. App. 9a, 7a n.7. The Bishop Memorial Chapel, located on campus, is used both for the Bishop Memorial Church's Sunday services and for the schools' weekly chapel services. C.A. App. 43-44; see Pet. App. 10a, 11a & n.10. During the 1989-1990 school year the 71 members of the Bishop Memorial Church included none of the schools' students, and only 19 out of the approximately 250 full-time faculty members. C.A. App. 44-45.

Prior to 1988, all applicants for teaching positions that the schools consider subject to the Protestant-only requirement were required to provide at the time of hire either a baptismal record or a letter from a minister attesting to the applicant's membership in a Protestant church. Pet. App. 9a. More recently, applicants have been required to provide only a statement certifying their "membership in the Protestant religion," unless the schools specifically request further proof of affiliation. Since 1988, no applicant or teacher has been asked to provide such additional proof. *Ibid.*; C.A. App. 41. The schools have never required that teachers maintain active membership in a church, and no inquiry is ever made into the substance of a teacher's beliefs or the extent to which teachers integrate those beliefs into their teaching (or into their personal lives). Pet. App. 9a; C.A. App. 41.

2. Petitioner's policy of hiring only Protestant teachers completely barred Carole Edgerton from

competing for a vacant position as a substitute French teacher at the schools. Pet. App. 2a-3a. Edgerton complained to the Equal Employment Opportunity Commission that petitioner's policy discriminated against her on the basis of her religion. *Ibid.* When the Commission attempted to mediate the dispute, petitioner maintained that it was bound by the terms of Mrs. Bishop's will. *Id.* at 3a. The Commission then filed this action against petitioner, alleging that the Protestants-only policy violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 3a.

The district court granted petitioner's motion for summary judgment. Pet. App. 20a-43a. Applying (*id.* at 33a-38a) the test adopted by the court of appeals in *EEOC* v. *Townley Engineering & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988), cert. denied, 489 U.S. 1077 (1989), the district court concluded that the schools' "purpose and character" were "primarily religious" (Pet. App. 33a, 37a), and that the schools were therefore "religious * * * educational institution[s]" permitted to discriminate in employment on the basis of religion under Section 702(a) of the Civil Rights Act, 42 U.S.C. 2000e-1(a) (1988 & Supp. III 1991). Pet. App. 38a.[2]

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[2] The district court also held that petitioner's policy did not violate Title VII because being Protestant was a "bona fide occupational qualification" for teaching at the schools (Pet App. 24a-32a), and because it found that the schools' curriculum was "directed toward the propagation of a particular religion" (*id.* at 39a-43a). See 42 U.S.C. 2000e-2(e)(1)-(2). The court of appeals rejected both of these arguments, Pet. App. 12a-18a, and petitioner does not renew them in this Court. Pet. 7 n.5.

The court of appeals reversed. Pet. App. 1a-19a. The court reaffirmed (*id.* at 5a) the *Townley* approach, followed by the district court, of weighing "[a]ll significant religious and secular characteristics * * * to determine whether the corporation's purpose and character are primarily religious." *Townley*, 859 F.2d at 618. The court disagreed, however, with the district court's application of the *Townley* test to the specific facts of this case. Pet. App. 5a. After reviewing (*id.* at 7a-12a) the schools' "ownership and affiliation, purpose, faculty, student body, student activities, and curriculum," the court of appeals found those factors "either essentially secular, or neutral as far as religion is concerned." *Id.* at 6a. The court concluded that the schools are "an essentially secular institution operating within an historical tradition that includes Protestantism."[3]

[3] In particular, the court noted that "[n]o religious organization has ever controlled or supported the Schools" (Pet. App. 7a); that "the purpose and emphasis of the Schools have shifted over the years from providing religious instruction to equipping students with ethical principles that will enable them to make their own moral judgments" (*id.* at 8a); that, while petitioner adheres to the Protestant-only rule, the schools "have never required their teachers to maintain active membership in a church, and do not inquire into the substance of a teacher's beliefs or the extent to which teachers integrate those beliefs into their work" (*id.* at 9a); that petitioner does "not consider the religious affiliation of prospective students on or off campus" (*ibid.*); that students participate in a wide range of extracurricular activities, most of which are non-religious (*id.* at 9a-10a); that the curriculum "offer[s] a complete array of courses in math, science, English, languages, and social studies, all of which are taught from a secular perspective," and that students must fulfill only "a limited religious education requirement" consisting of "minimal, largely comparative religious studies" (*id.* at 10a, 12a).

Id. at 12a. Accordingly, the court held that the schools' "purpose and character [are] primarily secular, not primarily religious," *ibid.*, and that petitioner is therefore not entitled to engage in religious discrimination as a "religious * * * educational institution" under Section 702(a).

ARGUMENT

1. Petitioner contends that the decision below conflicts with the decisions in *Little* v. *Wuerl*, 929 F.2d 944 (3d Cir. 1991), and *EEOC* v. *Mississippi College*, 626 F.2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981). Neither of those decisions dealt with the issue involved in this case.

This case involves the question whether an employer is a "religious * * * educational institution" within the meaning of Section 702. *Little*, on the other hand, was a suit against the Roman Catholic bishop of Pittsburgh, as owner and operator of a local Catholic school, and challenged the statutory right of that concededly religious school (see 929 F.2d at 948) to discriminate on the ground that a teacher's second marriage violated Catholic teachings. *Id.* at 946. In *Mississippi College*, the parties similarly did not dispute the religious character of the College, which was owned and operated by the Mississippi Baptist Convention. See 626 F.2d at 478-479, 481, 484-486, 487. The decisions in those cases are thus irrelevant to the question of whether an employer is a religious institution entitled to assert exemption under Section 702.[4]

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4 Little involved "what it means for someone to be 'of a particular religion'" for purposes of the exemption afforded to religious employers by Section 702. 929 F.2d at 950. Mississippi College considered and rejected the EEOC's contention

In fact, the question presented in this case does not appear to have arisen frequently. In most cases involving the Section 702 exemption, as in *Little* and *Mississippi College*, the employer's status as a "religious * * * institution" is conceded or clear.[5] See *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 330 n.3 (1987); *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164,

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that "the College's mere assertion that it declined to hire [a teacher] because of her religion should not prevent it from investigating to determine if the College used [the teacher's] religion as a pretext for some other form of discrimination." 626 F.2d at 484.

[5] In all of the cases cited in the text, the employer in question was either a church or an entity owned, controlled or operated by a church. As the court of appeals recognized (Pet. App. 6a n.5), a school not owned, controlled or operated by a church may still qualify as a "religious * * * educational institution" for purposes of Section 702. Petitioner is thus wrong in arguing (Pet. 15) that the decision below renders Section 702 redundant because of the provision in Section 703(e)(2) (42 U.S.C. 2000e-2(e)(2)) that a school may hire employees of a particular religion if either "[it] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation," or "the curriculum * * * is directed toward the propagation of a particular religion." Under the Ninth Circuit's construction, Section 702 goes further than Section 703(e)(2) by exempting any school, regardless of ownership or the active propagation of a particular religion, so long as its "purpose and character" are nevertheless primarily religious. Moreover, while neither the appropriate line of demarcation between the two Sections nor the test petitioners propose for determining coverage under Section 702 is particularly clear, the vague "broad construction" that petitioners urge (Pet. 15) would seem at least as likely to render the two sections duplicative, by allowing Section 702's general exemption to swallow the specific requirements of Section 703.

1164-1165 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986); *EEOC* v. *Fremont Christian School*, 781 F.2d 1362, 1364 (9th Cir. 1986); *EEOC* v. *Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1274-1275, 1277 (9th Cir. 1982); *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277, 279 (5th Cir. 1981). See also *Townley*, 859 F.2d at 618. So far as we are aware, *Townley* and the decision below are the only two appellate decisions in which an employer's religious status for purposes of Section 702 has been seriously at issue.[6]

2. In the court of appeals, both parties accepted the authority of *Townley* (Pet. C.A. Br. 16; Gov't C.A. Br. 13), petitioners arguing only that "upon a careful balancing of all significant characteristics, both religious and secular, the purpose and character of [the schools] is primarily religious." Pet. C.A. Br. 18. The court of appeals conducted the fact-specific balancing urged by petitioners, but reached the opposite conclusion. In this Court petitioners now claim for the first time that the *Townley* test improperly "requires, for any exemption under Section 702, that courts and the EEOC make extremely intrusive inquiries into religious matters." Pet. 15. Petitioners have waived that argument. See, *e.g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1531 (1992); *Adickes* v. *S.H. Kress & Co.*, 398

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[6] See also *Fike* v. *United Methodist Children's Home*, 547 F. Supp. 286 (E.D. Va. 1982) (holding that the defendant had become too secular to qualify for exemption under Section 702, but that on the facts of the case it had not discriminated on the basis of religion), aff'd, 709 F.2d 284 (4th Cir. 1983) (considering only the latter ground).

U.S. 144, 147 n.2 (1970). It is not, in any event, persuasive.

When a legislature must choose between applying a statute to religious organizations or exempting such organizations, "[e]ither course * * * occasions some degree of involvement with religion." *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970). Exemption—the approach that Congress took in Title VII—is generally the course that raises fewer constitutional concerns, because it "effectuates a more complete separation" between church and state. *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. at 339. But religious exemptions inevitably carry with them the need to determine who is exempt.

Section 702 creates an exemption from the prohibition against religious discrimination for "religious" organizations. Where an organization asserts that it qualifies for that exemption, a court called upon to resolve the issue must necessarily determine whether the organization is "religious." The court of appeals' approach (Pet. App. 5a) of weighing the organization's religious and secular characteristics in order to determine its primary "purpose and character" is eminently sensible. Petitioner itself suggests no more appropriate methodology, and none occurs to us.[7]

This Court has explicitly recognized that courts may be called upon to conduct inquiries similar to

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[7] Petitioner insists (Pet. 14-15) that Section 702 should be given a "broad" rather than a "narrow" construction. Altering the breadth of the exemption, however, would not alter the need to conduct *some* inquiry into whether the employer is a "religious" organization, unless the trial court is simply to accept an employer's bald assertion, or its evidence of *any* religious content in its program (cf. Pet. i), as legally conclusive.

that undertaken by the court of appeals in this case. For example, in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985), the Court affirmed a factual determination that the petitioner foundation's business activities were commercial rather than religious (and therefore subject to the requirements of the Fair Labor Standards Act), while approving a judicial inquiry that scrutinized "the activities at issue by reference to objectively ascertainable facts concerning their nature and scope." *Id.* at 299. Questions arising under the Establishment Clause may similarly require judicial evaluation of the religious and secular aspects of particular institutions or activities. See *Roemer* v. *Board of Public Works*, 426 U.S. 736, 755-761 (plurality opinion), 768-769 (White, J., concurring in the judgment) (1976) (determination of whether certain Catholic colleges were "pervasively sectarian" or whether some of their activities were essentially secular). Cf. *Wisconsin* v. *Yoder*, 406 U.S. 205, 235-236 (1972) (allowing exemption from state compulsory education law under Free Exercise Clause only after detailed scrutiny of particular religion's character and practices); *id.* at 240-241 (White, J., concurring).

Petitioner cites *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), for the proposition that Section 702's exemption should be construed "broadly" in order to avoid constitutional questions about the application of Title VII. Pet. 14-15. The inquiry involved here, however—weighing the religious and secular aspects of an institution to determine whether it qualifies for a religious exemption in the first instance—raises no risk of the kind of ongoing substantial governmental involvement in a religious

institution's operations that concerned this Court in *Catholic Bishop*.[8] See 440 U.S. at 502-504 & n.10.

3. The court of appeals' factual conclusion, see *Tony & Susan Alamo Foundation*, 471 U.S. at 299, that petitioner's purpose and character are "primarily religious" is correct, and does not warrant review by this Court.

The religious component of the Kamehameha Schools' curriculum consists of 15-30 minutes a week of Bible stories, religious songs and prayer for one semester in the elementary grades; one quarter-long course of "largely comparative religious studies" per year in grades 7-9; and mandatory attendance at devotional services every other week in later years. Pet. App. 10a-12a & n.10. The remainder of the school program is non-religious, consisting of "a complete array of courses in math, science, English, languages, and social studies, all of which are taught from a secular perspective." *Id.* at 10a. More than two-thirds of the on-campus student body is non-Protes-

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[8] Indeed, the Court's decision in *Catholic Bishop* has given rise to an entire line of cases in which the NLRB and the courts of appeals have analyzed precisely the question of whether a particular employer is sufficiently religious in character to qualify for the exemption recognized in that case. See *Volunteers of America, Los Angeles* v. *NLRB*, 777 F.2d 1386, 1389-1390 (9th Cir. 1985); *NLRB* v. *Salvation Army of Massachusetts Dorchester Day Care Center*, 763 F.2d 1, 6 (1st Cir. 1985); *Volunteers of America-Minnesota-Bar-None Boys Ranch* v. *NLRB*, 752 F.2d 345, 348 (8th Cir.), cert. denied, 472 U.S. 1028 (1985); *Denver Post of the Nat'l Soc'y of the Volunteers of America* v. *NLRB*, 732 F.2d 769, 772 (10th Cir. 1984); *St. Elizabeth Community Hospital* v. *NLRB*, 708 F.2d 1436 (9th Cir. 1983); *Tressler Lutheran Home for Children* v. *NLRB*, 677 F.2d 302 (3d Cir. 1982); *NLRB* v. *St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981).

tant (C.A. App. 47-48), and petitioner does not seek to convert these students to Protestantism.[9] Pet. App. 9a-10a. Although petitioner requires teachers to state formally that they are Protestants, it does not inquire further into their actual religious beliefs, or into whether and how they might put those beliefs into practice in the classroom. *Ibid.* See also note 3, *supra*; Pet. App. 6a-12a. The court of appeals' conclusion that petitioner is not primarily a religious institution thus finds ample support in the record.[10]

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[9] Petitioner criticizes the court of appeals (Pet. 18) for taking into account the "lack of overt proselytization toward non-Protestant students." While the fact that the schools make no active attempt to convert non-Protestant students is not determinative, it is certainly relevant to whether petitioner should be considered a "religious * * * educational institution" for purposes of exemption from liability under Title VII.

[10] Petitioner's suggestion (Pet. 11) that the Ninth Circuit's approach will cause Kamehameha and similar schools to "completely lose their religious character" is unpersuasive. Requiring petitioner to consider non-Protestants as teachers for secular classes will have no effect whatever on requirements that students attend religious education classes, say grace before meals, pray in the classroom, before athletic or other events and at commencement, or attend religious services. See Pet. 4-5. Nor will application of Title VII prevent petitioner from establishing relevant criteria to ensure that its teachers are equipped to fulfill its stated purpose to "provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women." Pet. App. 2a n.1 (quoting the Bishop will).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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